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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 317

FRIEDRICH FLICK, PETITIONER

v.

LOUIS A. JOHNSON, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 181-185) is reported at 174 F. 2d 983. The opinion of the District Court (R. 16-20), is reported at 76 F. Supp. 979.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1949 (R. 186). On July 19, 1949, the Chief Justice by order extended the time for filing a petition for a writ of certiorari to Septem-

ber 8 (R. 191) when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the District Court for the District of Columbia has power to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of a tribunal established pursuant to Allied Control Council Law No. 10 and United States Military Government Ordinance No. 7, imposed after trial and conviction for war crimes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article II, § 2 of the Constitution provides:

> The President shall be Commander in Chief of the Army and Navy of the United States, * * *.

28 U.S.C. 2241 provides:

> *Power to grant writ*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

STATEMENT

On March 15, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the District of Columbia on behalf of the petitioner, Friedrich Flick (R. 2-11). Petitioner is a German national and is presently confined in the American zone of occupation in Germany, in the custody of the United States Army (R. 14). The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, the Provost Marshal General of the Army, the Commanding General, European Command, United States Occupied Zone of Germany "and subordinates in command" (R. 10).[1]

Flick is confined pursuant to a sentence imposed by United States Military Tribunal IV, sitting in Germany, after his trial and conviction on charges of war crimes. In the petition for a writ of habeas corpus, it was alleged that the Tribunal was not legally constituted, that Flick was denied a fair trial as guaranteed by the Constitution of the

[1] Since, under Executive Order No. 10062, dated June 6, 1949 (14 F.R. 2965), and action taken pursuant thereto, governmental functions of the United States in Germany have been assumed by the Department of State, the ultimate control over petitioner's custody rests in the United States High Commissioner who is under the direction of the Secretary of State. Accordingly, unless the Secretary of State can be substituted as a party, this case has become moot.

United States and that his trial was not conducted in accordance with the United States' Articles of War, and that "the acts of which Petitioner was found guilty * * * do not constitute offenses against the United States of America or against the Law of Nations." The District Court dismissed the petition, holding that it lacked jurisdiction to issue the writ of habeas corpus where, as here, the petitioner was detained without the territorial jurisdiction of the court (R. 16-20).[2]

On appeal, the Court of Appeals for the District of Columbia affirmed the order of the District Court dismissing Flick's petition for a writ of habeas corpus (R. 186). In doing so, however, the Court of Appeals based its decision upon different grounds than those relied upon by the District Court. Citing its earlier decision in *Eisentrager* v. *Forrestal*, 174 F. 2d 961, now pending before this Court on petition for a writ of certiorari, No. 306, the Court of Appeals stated that the District Court for the District of Columbia was not deprived of power to issue the writ of habeas corpus by the circumstance that the petitioner was detained in Germany without the territorial jurisdiction of the District Court; but it nevertheless affirmed the order of the District Court because it found that the tribunal which tried and convicted Flick was not a tribunal of the United States and that therefore, pursuant to *Hirota* v. *MacArthur*,

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[2] The District Court's decision was rendered shortly before the decision of this Court in *Ahrens* v. *Clark*, 335 U. S. 188.

338 U. S. 197, its judgment was not reviewable by the District Court. The Court of Appeals stated (R. 184-185):

> If the court was not a tribunal of the United States, its actions cannot be reviewed by any court of this country. (*Hirota* v. *MacArthur, supra.*) If it was an international tribunal, that ends the matter. We think it was, in all essential respects, an international court. * * *
>
> * * * * * * *
>
> Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council? * * *

ARGUMENT

The Government believes that the decision of the court below in affirming the dismissal of the petition for a writ of habeas corpus is sustainable upon any one of the following grounds:

1. That under this Court's decision in *Ahrens* v. *Clark*, 335 U. S. 188, the District Court is without power to issue the writ because the petitioner is detained outside of the territorial jurisdiction of that court;

2. That the petitioner as a non-resident enemy alien possesses no substantive legal rights which are enforceable in courts of the United States;

3. That the establishment of the tribunal which tried the petitioner, and his trial, conviction and detention pursuant to sentence by that tribunal are consequences of the foreign and military policy of the United States as embodied in international agreements, and do not present justiciable issues.

Propositions 1 and 2, above, are set forth in the Government's petition for a writ of certiorari in *Johnson* v. *Eisentrager,* No. 306, this Term, to which we respectfully refer the Court without repetition here. The third basis for sustaining the decision below which is sufficient in and of itself apart from the questions presented in the *Eisentrager* case, is discussed hereafter.

The apprehension, trial, and punishment of war criminals has been a major war aim and is a part of the basic post-surrender policy of all the nations participating in the war against the Axis. In the words of President Roosevelt, "when victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and in Asia" (9 Dept. of State Bull., No. 214, p. 62, July 31, 1943). In a resolution dealing with Nazi atrocities, Congress declared, early in 1943, that it was its sense "that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible." Conc. Res. of March 18, 1943, 57 Stat. 721. This

Court has recognized that the punishment of war crimes is an important incident to the conduct of war. *Ex parte Quirin*, 317 U. S. 1, 8; *In re Yamashita*, 327 U. S. 1, 11.

The development by the nations allied against Nazi Germany of a joint war crimes policy began with the Tripartite Declaration of Moscow on German Atrocities in 1943. 9 Dept. of State Bull. 310. The implementation of that policy began with the London Agreement and Charter of the International Military Tribunal of August 8, 1945. By the London Agreement (of which the Charter was a part), the governments of the United States, France, Great Britain and the Soviet Union provided for the establishment of the International Military Tribunal composed of members designated by each of the four signatory governments, defined the substantive law to be applied by the International Military Tribunal under the headings of crimes against peace, war crimes, and crimes against humanity, and provided for a prosecution staff representing the four governments. The President thereupon designated Mr. Justice Jackson to act as chief prosecutor on behalf of the United States, and Mr. Francis Biddle as the American member of the Tribunal.

The International Military Tribunal conducted one trial involving the principal Nazi leaders, Goering and others. In view of the close similarity between the origin and composition of the Tribunal to that of the International Military Tribunal for the Far East, it is clear that the former,

like the latter, was "not a tribunal of the United States" and that its judgments too are in no way reviewable by the courts of the United States. *Hirota* v. *MacArthur*, 338 U. S. 197.

On December 20, 1945, shortly after the beginning of the trial before the International Military Tribunal, the Allied Control Council for Germany enacted Control Council Law No. 10 (R. 43-49). The Control Council for Germany was created as a quadripartite body consisting of representatives of the United States, Great Britain, France, and the Soviet Union. In the Berlin Declaration, June 5, 1945, those four governments announced as follows:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. [12 State Dep't. Bull. 1051]

On the same date, the four governments announced the creation of the Control Council as follows:

> 1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Gov-

ernments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a political adviser.

2. The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole. [12 State Dep't. Bull. 1054]

It is thus clear that the decisions incorporated in laws of the Control Council have been the supreme law for Germany.

Control Council Law No. 10 states as its purpose "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Article I provides that the Moscow Declaration of October 30, 1943, and the London Agreement of August 8, 1945, "are made integral parts of this law." Article II recognizes and defines (a) Crimes against peace, (b) war crimes, and (c) crimes against humanity, substantially in the same terms as in the Charter of the International Military Tribunal. It also defines as a crime, "membership in cate-

gories of a criminal group or organization declared criminal by the International Military Tribunal." Paragraph 3 of Article II authorizes punishments ranging from death to deprivation of civil rights. Paragraph 4 of the Article states the principles that acting in an official capacity or in obedience to the orders of a superior does not free a person from responsibility for a crime.

Article III of Control Council Law No. 10 provides, *inter alia,* that "Each occupying authority, within its Zone of occupation, (a) shall have the right to cause persons within such zone suspected of having committed a crime, * * * to be arrested * * *; (d) shall have the right to cause all persons so arrested * * * to be brought to trial before an appropriate tribunal." Paragraph 2 of Article III provides (R. 46) that:

> The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

The other provisions of Control Council Law No. 10 deal largely with the delivery of defendants

and the availability of witnesses from one occupation zone to another.

Acting under Control Council Law No. 10, the Military Governor of the United States Zone of Occupation on October 18, 1946, issued Ordinance No. 7 (R. 20-29) "to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein contained shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses."

Article II of Ordinance No. 7 provides in part as follows (R. 20-21):

> (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.
>
> (b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this

Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

Article XV provides that the judgments of the tribunals as to the guilt or innocence of the accused shall be final and not subject to review. Article XVI authorizes such a tribunal to impose, upon conviction, one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10. Article XVII provides that except in cases tried by joint zonal courts "the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof." Also, Article XVIII provides that "No sentence of death shall be carried into execution

unless and until confirmed in writing by the Military Governor."

Other provisions of Ordinance No. 7 prescribe the procedure to be followed by the tribunals, and provide for a Central Secretariat to assist the tribunals.[3]

By a series of executive orders, the President has designated various American citizens to act as members and alternates on the military tribunals established by Ordinance No. 7. Most of these persons have been judges or former judges of American state courts. Typical of these executive orders is the first one, Executive Order 9813, of December 20, 1946 (11 F.R. 14607), which reads in part as follows:

> By virtue of the authority vested in me by the Constitution and the statutes, and as President of the United States and Commander in Chief of the Army and Navy of the United States, and in the interest of the military and foreign affairs functions of the United States, it is ordered as follows:
>
> 1. I hereby designate Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington, Harold L. Sebring, Associate Justice of the Supreme Court of the State of Florida, Johnson Tal Crawford, Judge of a District Court of the State of

[3] Ordinance No. 7 was amended by Ordinance No. 11, effective February 17, 1947, principally to provide for a supervisory committee of the presiding judges and for joint sessions of the tribunals.

Oklahoma, as the Members, and Victor C. Swearingen, former Special Assistant to the Attorney General, as the Alternate Member, of one of the several military tribunals established by the Military Governor for the United States Zone of Occupation within Germany pursuant to the quadripartite agreement of the Control Council for Germany, enacted December 20, 1945, as Control Council Law No. 10, and pursuant to Articles 10 and 11 of the Charter of the International Military Tribunal, which Tribunal was established by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, for the trial and punishment of major war criminals of the European Axis. Such members and alternate member may, at the direction of the Military Governor of the United States Zone of Occupation, serve on any of the several military tribunals above mentioned.

2. The Members and the Alternate Member herein designated shall receive such compensation and allowances for expenses as may be determined by the Secretary of War and as may be payable from appropriations or funds available to the War Department for such purposes.[4]

[4] Similar designations were made by the following Executive Orders: 9819—Jan. 10, 1947 (12 F.R. 205); 9827—Feb. 21, 1947 (12 F.R. 1215); 9852—May 15, 1947 (12 F.R. 3183); 9858—May 31, 1947 (12 F.R. 3555); 9868—June 24, 1947

The members thus designated were assigned to tribunals by the Military Governor.

On January 16, 1946, the President, by Executive Order 9679 (11 F.R. 703 (R. 53-54) vested the Chief of Counsel, Mr. Justice Jackson, with the additional authority to proceed before United States military or occupation tribunals, and provided that upon his vacation of office a Chief of Counsel be appointed by the United States Military Governor for Germany. On October 24, 1946, General Order No. 301 (R. 55) announced the transfer of the Office of Chief of Counsel for War Crimes to the Office of Military Government (U. S.) for Germany and the appointment of Brigadier General Taylor as Chief of Counsel.

Both the Military Governor in issuing Military Government Ordinance No. 7, and the President in designating persons to serve on the tribunals established by the Ordinance, expressly indicated that they were implementing Control Council Law No. 10. Moreover, Article X of Ordinance No. 7 provided that the tribunals to be established thereunder should be bound by certain determinations and findings of the International Military Tribunal in Case No. 1, Goering, et al. (R. 25). What Ordinance No. 7 did was to provide military tribunals and a procedure for the trial of charges of war crimes as defined in Control Council Law

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(12 F.R. 4135); 9882—Aug. 7, 1947 (12 F.R. 5417); 9917—Dec. 31, 1947 (13 F.R. 26).

No. 10. All of this was in implementation of the agreements between the Allies for the punishment of war crimes.

Military Tribunal IV, which tried, convicted and sentenced petitioner, was established in accordance with Control Council Law No. 10 and Military Government Ordinance No. 7. Petitioner was charged by indictment with the following offenses, either as a principal, accessory or other participant: enslavement of labor (Count 1), plunder of property (Count 2), persecution on political, racial or religious grounds (Count 3), and support of groups or organizations declared criminal by the International Military Tribunal (Count 4) (R. 115-130). He was found guilty under Counts 1, 2 and 4 (R. 56-102), and was sentenced to seven years imprisonment (R. 15).

Control Council Law No. 10, in authorizing the trial of any person in a zone of occupation on charges of war crimes as defined in that Law, is law for Germany and German nationals in Germany. The Control Council could have provided for tribunals composed of representatives of the four occupying powers, or it could, as it did (R. 46), authorize such trials in German courts. Instead it authorized the trial of such charges by tribunals and under procedures to "be determined or designated by each Zone Commander for his respective Zone." It is well established that the President and his military commanders may estab-

lish courts not provided for by the Articles of War and confer upon these courts civil or criminal jurisdiction. *Leitensdorfer* v. *Webb,* 20 How. 176; *The Grapeshot,* 9 Wall. 129; *Mechanics' & Traders' Bank* v. *Union Bank,* 22 Wall. 276. Admittedly, the President, or the military commanders who represent him, can join with allied governments in establishing an international tribunal to implement the joint war crimes policy of the United States and its allies. *Hirota* v. *MacArthur, supra.* Similarly, there is no reason why the President or those representing him could not agree with our Allies on implementation of the Allied war crimes policy by tribunals to be established by each Zone Commander.

Here, the United States Zone Commander, with the obvious approval of the President, established military tribunals to implement the Allied war crimes policy embodied in Control Council Law No. 10. These tribunals were designated as *military tribunals* in Ordinance No. 7, and they were in fact such, since they were created in the exercise of the power to govern occupied territory. Without more, the fact that the tribunal which tried petitioner is a military tribunal would limit the scope of review to the issues which may be raised in habeas corpus to challenge the jurisdiction of an American military tribunal. Those issues have been repeatedly stated as (1) was the tribunal legally established, (2) did it have jurisdiction of

the offense and the person, and (3) did it impose a sentence within its powers. *In re Yamashita*, 327 U. S. 1, 8-9, and cases cited there. The answer here is that Control Council Law No. 10 authorized the creation of Military Tribunal IV which tried petitioner and that Control Council Law No. 10 conferred upon that tribunal jurisdiction to try petitioner for the offenses with which he was charged and to impose upon him the sentence which he received.

The Government submits that Control Council Law No. 10 is not open to challenge in the courts of the United States. That law, like other arrangements which the President made or may make with our wartime allies for the government of occupied enemy territory, derives from the President's constitutional powers as commander in chief of the armed forces of the United States and as the organ of our foreign relations. In the absence of applicable constitutional or statutory[5] limitations, the President's exercise of these powers involves only political questions.

Petitioner would find such statutory limitations in the Articles of War, and he contends (R. 5) that Articles 25 and 38 in particular were applicable to his trial by Military Tribunal IV. The trial of an enemy combatant before an American military commission is not governed by the Articles of

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[5] Whatever may be the powers of Congress in this field, it has not acted.

War. *In re Yamashita,* 327 U. S. 1, 19-20. It follows that petitioner, an enemy non-combatant, need not be tried in accordance with the Articles of War.

While petitioner also asserts that he was denied "the fair trial guaranteed by the Constitution of the United States," it seems clear that the specific procedural guarantees of the United States Constitution have no application to the trial of Germans in Germany pursuant to Control Council Law No. 10. In the first place, it is difficult to conceive that all of the arrangements which the powers occupying Germany make either collectively or singly for its government generally or for the punishment of war crimes are subject to the limitations of the domestic law of the occupying powers. In the case of the United States, the proposition is incredible, since it has been long and repeatedly held that the Constitution has only a limited application to territory which has been annexed by the United States, but not incorporated into the United States. *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298. Here, the United States and the other powers occupying Germany have disclaimed any intention to annex Germany. Under the conditions of a temporary military occupation, it is difficult to fix upon any one provision of the Constitution which is applicable to enemy aliens residing in territory so occupied. As this Court put it in *Neely* v. *Henkel,*

180 U. S. 109, 122, the guarantees of the Constitution "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." In any event, the same invocation of the Constitution by an enemy alien was made without success in the *Yamashita* case.

In brief, therefore, we believe that all of the elements of jurisdiction for petitioner's trial by Military Tribunal IV were conclusively determined by Control Council Law No. 10. No other issues are open to challenge in courts of the United States for, as this Court has held: "We do not here appraise the evidence on which petitioner was convicted. * * * [the] rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities." *In re Yamashita,* 327 U.S. at pp. 17, 23. These rules, applicable to the trial of enemy aliens before an American Military Commission, apply *a fortiori* to the trial of enemy aliens before tribunals established to implement the Allied war crimes policy embodied in Control Law No. 10.

If, as the Government contends, Control Council Law No. 10 conclusively establishes the jurisdiction of Military Tribunal IV which tried petitioner, then it is unnecessary to characterize that tribunal as an international tribunal. We believe, however, that the court below was justified in con-

cluding that the Tribunal in essential respects was international in character. As petitioner points out (Pet. pp. 61-63), the tribunal here involved differs from that examined by this Court in *Hirota* v. *MacArthur, supra,* in several respects. For example, the tribunal which tried petitioner consisted of three American nationals, while Hirota and his codefendants were tried by a tribunal composed of judges from 11 countries. We think the court below properly held that such formal characteristics were not controlling, but rather that inquiry must be made into "the source of its power and jurisdiction to determine whether it was a court of the United States" (R. 182). As pointed out above, Military Tribunal IV derives its jurisdiction over petitioner from Control Council Law No. 10, just as the International Military Tribunal derived its jurisdiction from the London Agreement. Giving effect to that Law, and to the President's undoubted power to provide for its implementation in the United States zone of occupation, we do not see why it should make any difference whether the tribunal was staffed with Americans, or allied nationals or even Germans. At the least, the tribunal is an instrument created in the exercise of the President's constitutional powers to wage war and to govern occupied territory, for the purpose of carrying out international agreements which were within his powers to make. The fact that the Allied Governments decided to carry out their war crimes

program through judicial proceedings, did not mean that tribunals created to execute that policy become tribunals of the United States in the sense that their judgments are reviewable by national courts of the United States. Instead, so far as concerns the courts of the United States, the judgments of these military tribunals are as much an implementation of the foreign and military policy of the United States as was American participation in the enactment of Control Council Law No. 10. In this sense, therefore, we believe that Military Tribunal IV which tried petitioner was, as the court below held, not a tribunal of the United States. And, in this sense, too, it is not necessary to characterize the Tribunal as an international tribunal in order to reach that result.

CONCLUSION

The judgment of the court below is correct. Regardless of the ultimate disposition of *Johnson* v. *Eisentrager,* No. 306 this Term, in which the Government seeks certiorari, the result reached below in the present case is correct and there is no need for further review here.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1949.

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